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ABSTRACT

The document presents a summary of major federal legislation affecting the policy and operation of educational programs and activities. The handbook is intended to help educators locate information on the constitutional aspects of anti-discrimination laws. The document is presented in four chapters. Chapter I discusses the constitutional aspects of anti-sex discrimination efforts and presents examples of challenges to sex discrimination based upon the U.S. Constitution. Also discussed are legally permissible types of discrimination under the 14th amendment and tests used by the courts to determine whether a discriminatory law is constitutionally permissible. Chapters II and III focus on Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. Information is presented on who is regulated by each act, what is prohibited, exceptions to coverage, and sources of additional information. Chapter IV discusses Title IX of the Education Amendments of 1972. Topics discussed include who is regulated, exemptions to coverage under the regulations, what is mandated, general requirements, treatment of students, and sources of additional information. (DB)

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EDUCATORS' HANDBOOK ON FEDERAL ANTI-SEX DISCRIMINATION LAWS

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IN EDUCATION

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CONTENTS

INTRODUCTION	iii
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CONSTITUTIONAL ASPECTS OF ANTI-SEX DISCRIMINATION EFFORTS	1
---	---

TITLE VII OF CIVIL RIGHTS ACT OF 1964	9
--	---

EQUAL PAY ACT OF 1963 (as amended)	15
---	----

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972	21
---	----

INTRODUCTION

The Institute for Equality in Education under the direction of Dr. Nancy Scott is a federally funded project under Title IV of the Civil Rights Act of 1964. The purpose of the Institute is to provide assistance to school districts in their efforts to eliminate sex-role stereotyping in educational programs and activities, and to provide structures, processes, and resources for the effective implementation and evaluation of sex desegregation programs. My role as Field Coordinator for the Institute includes conducting and facilitating various sessions at the Institute's several training workshops. During these presentations, I have come to recognize the need for a handbook like this one. Today, educators are confronted with a myriad of state and federal laws that directly and indirectly affect the policy and operation of educational programs and activities. This handbook is designed to serve as a ready reference for educators on three of those laws and to shed insight on the constitutional aspects of all anti-discrimination laws. The handbook is designed to be a non-technical, easily understandable, summary presentation on several important laws and constitutional law principles that affect educators. Hopefully, as educators become more familiar with the various laws and regulations that affect them, they will begin to cease viewing governmental anti-discrimination efforts as a piece-meal, haphazard infringement on local autonomy and begin viewing such efforts as a comprehensive, systematic approach making use of both state and federal resources to address a problem of gigantic magnitude.

James Mercer
Field Coordinator
Institute for
Equality in Education

**THE CONSTITUTION
AND
SEX DISCRIMINATION**

CONSTITUTIONAL PROHIBITIONS AGAINST SEX DISCRIMINATION

Any analysis of anti-sex discrimination laws should begin with an examination of the "Equal Protection Clause" of the U.S. Constitution. The Equal Protection Clause is embodied in the 14th Amendment to the Constitution and provides that:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

It is this clause upon which most constitutional challenges to sex discriminatory action is based. Put very simply, the Equal Protection Clause means that a state must apply its laws uniformly; that a state's laws must treat all citizens of that state equally. A state cannot through its laws treat its citizens differently, i.e., subjecting one class of citizens to a particular law and exempting others. Its laws must apply equally to blacks and whites, males and females, and to Chicanos and Anglos. One group cannot be singled out for "different" treatment than that afforded other groups.

The U.S. Supreme Court has concluded that there are exceptions to this rule; that the Equal Protection Clause does not prohibit all forms of uneven application of the law by the states. In short, certain forms of discrimination or differential treatment of citizens by a state through the use of its laws are constitutionally permissible while other forms are not.

Legally Permissible Discrimination Under the Equal Protection Clause

In a variety of instances, state laws apply to one group of citizens and not to another. For example, people over sixteen who have passed certain requirements are allowed by state law to drive, while sixteen year olds not passing certain tests are not allowed to drive. Residents of a state for more than thirty days can vote; those who have resided in the state for less than thirty days cannot vote. How can one decide, then, when a law that treats one class of

citizens differently from another class of citizens is legal? The Courts have used two distinct tests:

- THE RATIONAL RELATIONSHIP TEST
- THE STRICT SCRUTINY TEST

Rational Relationship Test

The Rational Relationship test is basically a test of "reasonableness." Is a state's action *reasonably* necessary to achieve some legitimate state purpose. If so, that action is constitutionally permissible although it may subject citizens to different treatment under the law. The two central questions involved in meeting the rational relationship test are:

1. Is the state furthering some legitimate state purpose by passing a law which impacts differently on different citizens?
2. Is there some difference between the two classes of people that makes it reasonable to treat them differently?

IF THE ANSWER TO BOTH QUESTIONS IS YES, THE LAW IS VALID.

The application of the rational relationship test is left up to the Courts. The burden when applying the test is on the plaintiff (the person complaining of the discriminatory act) to prove that the law complained of furthers no legitimate state purpose in subjecting various classes of citizens to differential treatment. In law suits alleging sex discrimination, this burden has proven formidable. The Courts consistently seem to find some spurious state purpose being furthered through the enforcement of sex discriminatory laws. In fact, inequality under the Fourteenth Amendment dates back to 1873 when the Supreme Court in *Bradwell vs. Illinois* held:

"...The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization . . . indicates the

domestic sphere as that which properly belongs to the domain and functions of womanhood.

... The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."

Since *Bradwell v. Illinois*, the Courts have relied upon various questionable rationales in upholding laws making distinctions on the basis of sex. For example:

- In upholding a state statute barring women from participation in wrestling matches, the Oregon Supreme Court held in 1956 that; "obviously (the Legislature) intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman."
- In denying women the right to serve on juries, the Mississippi Supreme Court held in 1966: "The Legislature has the right to exclude women so they may continue their service as mothers, wives, and homemakers, and also to protect them from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial."
- In denying female athletes the right to participate on a high school's only track team, the Superior Court of Connecticut in New Haven County in 1971 held: "...with boys vying with girls in cross-country running, and indoor track, the challenge to win and the glory of achievement, at least for many boys, would be a lost incentive. Athletic competition builds character in our boys. We do not need that kind of character in our girls, the women of tomorrow . . ."

Because in each of the above instances, the Court found that a *legitimate state purpose was being furthered* through the state's enactment of a law obviously discriminatory in its impact on women, all of the laws in the above examples were found by various courts to be constitutionally valid under the Equal Protection Clause of the U.S. Constitution.

The Strict Scrutiny Test

The second test used by the Courts in determining whether or not a state's discriminatory law is constitutionally permissible is called the *STRICT SCRUTINY* test. This test is only applied when a state law discriminates or categorizes on the basis of race, religion, national origin or when a state law allegedly infringes upon a citizen's fundamental rights guaranteed by the Constitution, i.e., the right to free speech, the right to privacy, etc. Race, religion, and national origin are known as "suspect classifications." If a state law singles out a group on the basis of that group's race, religion, or national origin or if a state law allegedly violates a citizen's fundamental constitutionally guaranteed right(s), that law will be subject to the strict judicial scrutiny test. This is a much more stringent and more exacting test than the rational relationship test. Under this test, the burden is on the state (not the plaintiff) to prove two elements:

1. That the purpose of the state's discriminatory law is to meet some compelling state objective;
2. That there is no less discriminatory manner by which the state can achieve its objective.

For example, if a state were to pass a law requiring its black citizens to be in their homes by 6:30 P.M. on weekdays, that law (because it discriminates or categorizes on the basis of race) would be subject to the strict scrutiny test. If the law were challenged, the state would, then, have to prove that the law is necessary to meet a *compelling state objective* and that the state has *no less discriminatory means at its disposal* to meet that objective. As one can easily observe (see chart below), the strict scrutiny test is a much more difficult test to meet than the rational relationship test.

Rational Relationship Test

1. Differential treatment under the law (not based on race, religion, national origin).
2. Burden on plaintiff.
3. Differential treatment is justified if in furtherance of some legitimate state objective.

Strict Scrutiny Test

1. Differential treatment under the law *based on* race, religion, or national origin.
2. Burden on state.
3. Differential treatment justified if:
 - A. Some compelling state purpose is present;
 - AND
 - B. the state has no less discriminatory way to achieve its objective.

Sex has not yet been declared by the Courts to be a suspect classification. Therefore, in any constitutional challenge of a law that discriminates on the basis of sex, Courts still apply the more lax and less stringent, rational relationship test. The result has been that many blatantly sex discriminatory laws have been found to be in furtherance of some questionable state purpose and therefore, constitutionally valid.

Today, however, several statutes exist that offer a more viable approach to attacking sex-based discrimination than perhaps the constitutional route.

TITLE VII

TITLE VII

Who Is Regulated?

One such law is Title VII of the U.S. Civil Rights Act of 1964. Broadly stated, Title VII prohibits discrimination on account of race, color, religion, national origin, or *SEX*; by ALL PRIVATE EMPLOYERS of 15 or more persons, all public and private EDUCATIONAL INSTITUTIONS, Federal, State and local GOVERNMENT, public and private EMPLOYMENT AGENCIES, LABOR UNIONS with 15 or more members, and joint LABOR MANAGEMENT COMMITTEES for apprenticeship and training. Religious institutions, however, may be exempt from the provisions of Title VII where the employment of a particular religion is necessary to carry out the purposes of the institution; i.e., Protestants may legally be discriminated against during the selection of a Rabbi.

What Is Prohibited?

In its terms, Title VII reaches every stage and step of the employment process, from the initial advertising of a job opening, (the maintenance of sex-segregated classified advertising is forbidden by Title VII; i.e., "help wanted—male" or "help wanted—female") to an employee's retirement, (the establishment of different retirement ages for men and women is also forbidden by Title VII; i.e., 62 for women and 65 for men).

In addition, Title VII reaches recruitment, applications, referrals, training, compensation, promotions, leaves, discharges, union memberships and every other process affecting the terms, conditions, or privileges of employment. The Act thus protects the right of persons to obtain and hold jobs without regard to race, color, religion, national origin, and sex; as well as the right to equal treatment once the job has been obtained. Title VII prohibits not only overt acts of discrimination in employment on the basis of sex, but outlaws covert or sex-neutral actions that have a discriminatory effect as well.

Disparate Impact Theory

The basis of the act's prohibition against sex-neutral practices that have a discriminatory effect rests on the "disparate impact theory." This theory was enunciated in *Griggs v. Duke Power Co.* 401 U.S. 424 (1971) and very simply means that an employment practice that on its face appears neutral, but which has a disparate impact upon a group protected by Title VII (racial group, religious group, etc.) although unintentionally discriminatory, nonetheless, constitutes illegal discrimination under Title VII. *Griggs v. Duke Power Co.* (cited above), firmly established that it is the "effect" or "consequences" of an employment practice that Courts look to in determining the existence or absence of a Title VII violation:

"Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation . . . Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices."

Exceptions to Title VII's Coverage

An important exception to the unlawful employment practices outlined above is found in the "bona fide occupational qualification" provisions of SECTION 703 (e) of the Act. In legal jargon, this provision is referred to as the BFOQ. The BFOQ exception, in effect, permits employment discrimination based on sex, religion, national origin, but *not* race, in those rare circumstances where one of these factors (religion, national origin, or sex) is reasonably necessary to the normal operation of a particular business or enterprise and therefore a bona fide qualification needed to perform the job.

The BFOQ exception has been interpreted very narrowly by the Courts. In very few instances have the Courts found the sex of an individual determinative of whether or not the individual is capable of performing a certain job. One Federal Court used the example of a wet nurse to illustrate the type of job in which an employer might legally be allowed to discriminate on

the basis of sex in its hiring. Female sex in this rare instance is a BFOQ. Similarly, for the job of sperm donor, male sex is a BFOQ. The only other jobs which have been mentioned as meeting the BFOQ exception are actor and actress. The Equal Employment Opportunity Commission's guidelines mention these two occupations on the grounds that one sex may be necessary to make a role seem authentic or genuine.

**Remedies
Under the Act**

A Court may order the employer to cease its discriminatory practices, to reinstate employees, to pay back wages, to pay plaintiff's reasonable attorney fees, and to take appropriate affirmative action to eliminate existing discrimination.

**For More
Information
on the Act**

The Equal Employment Opportunity Commission was established to investigate and resolve complaints of alleged discrimination under Title VII. For further information on Title VII contact:

Equal Employment Opportunity Commission
1800 G Street, N.W.
Washington, D.C. 20506

or any of its regional offices.

EQUAL PAY ACT

EQUAL PAY ACT

The Equal Pay Act enacted in 1963 is designed to address the pervasive and patently discriminatory practice of paying women less than men for the same work. The Act is a prohibition against pay differentials based on sex.

Who is Regulated?

ALL BUSINESSES WHICH MUST (BY LAW) PAY EMPLOYEES MINIMUM WAGE are prohibited from discriminating on the basis of sex in determining wages for workers. The Education Amendments of 1972 extended the Equal Pay Act's sex discrimination provision to include executive, administrative, and professional workers including ACADEMIC PERSONNEL. The official definition of who is regulated is that the company must be "engaged in commerce" or "engaged in the production of goods for commerce." This definition is not very helpful, but the Courts have interpreted it broadly to reach MANY COMPANIES AND ALL EDUCATIONAL INSTITUTIONS.

What is Prohibited?

Covered employers must pay women and men the same wages if they work at the same business location, under similar working conditions, doing similar work which requires equal or substantially similar skill, effort, and responsibility. The Act also prohibits an employer from reducing the wage rate of any employee in order to comply with the provisions of the Act. Finally, it prohibits labor organizations from causing or attempting to cause an employer to discriminate against an employee in violation of the equal pay provisions.

The burden is on the plaintiff in an equal pay case to prove that the work he or she is performing is *equal* to that being performed by employees of the other sex. The criteria to be used in determining whether work is "equal" was set forth in *Shultz v. American Can Co.* — *Dixie Products* 424 F. 2nd 356 (8th Cir. 1970), and *Shultz v. Wheaton Glass Co.* 421 F. 2nd 259 (3d Cir.),

cert. denied, 398 U.S. 905 (1970). The Courts emphasized that in equal pay cases, "equal" does not mean "identical." As the third Circuit stated in *Wheaton Glass*:

"Congress in prescribing 'equal' work did not require that the jobs be identical, but only that they must be *substantially equal*. Any other interpretation would destroy the remedial purpose of the Act. The Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it."

Because "equal" means "substantially equal" and not *identical*, employers cannot escape the consequences of the act by gerrymandering a few duties from its women employees to its male employees.

In *American Can Co. — Dixie Products* (cited earlier), American Can Co. maintained that the difference between male and female rates of pay was made because of the extra duties of handling and loading supplies performed by the male employees. The Court rejected this argument, reasoning instead that in applying Equal Pay Act standards, the "extra" weight lifting duties of the male employees were "minor and incidental" and "most of the physical and mental effort extended in the performance of the job" as a whole, related to the primary duties which both men and women employees performed in common; thus such "extra duties" did not render the work performed by males and that of their women counterparts unequal under equal pay standards.

Other jobs found to be "equal" include: nurse's aides and orderlies in hospitals; female assembly-line workers and male assembly-line workers in factories where some males do sporadic heavy lifting; janitors and maids in colleges; male salesclerks and female salesclerks in department stores no matter what kind of merchandise they sell.

**Exceptions
to the Act's
Coverage**

Under the Act, differences in pay between male employees and female employees doing equal work are permissible if the pay differential is pursuant to (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex. The impact of the statute has been severely limited by these exceptions. Because of the exceptions, litigation under the Act has primarily focused on seemingly endless details about the nature of a particular job, rather than on the paramount goal and intent of the Act; that is, the elimination of sex discrimination in pay. In many instances, the exceptions have been allowed to "swallow up" the substantive provisions of the Act.

**Remedies
Under
the Act**

A plaintiff in an equal pay lawsuit can be awarded up to two years of back wages, plus the same amount in liquidated damages, plus attorney's fees and court costs.

**More
Information
on the Act**

A section of the Dept. of Labor, the Wage and Hour Division, administers this law. It has offices both in Washington, D.C., and in cities around the country. If there is a local office, it will be listed in the telephone directory under United States Government, Labor Department, Wage and Hour Division.

TITLE IX

TITLE IX

Title IX of the Education Amendments of 1972 was enacted to remedy the disparate treatment of the sexes in education programs and activities. It provides that:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Who Is Regulated?

All public and private institutions receiving federal financial assistance for education programs or activities with few exceptions are covered by Title IX. This includes NEARLY EVERY PUBLIC SCHOOL DISTRICT in the nation and a significant number of post-secondary institutions.

Exemptions to Coverage Under the Regulations

However, there are several educational institutions that receive federal assistance but that are exempt, nonetheless, from Title IX mandates:

- (1) Religious institutions to the extent that the religious tenets of such organizations are inconsistent with the statute are exempt from Title IX coverage.
- (2) Institutions whose primary purpose is to train individuals for the military services and merchant marine are exempt.
- (3) Admissions to institutions *EXCEPT* vocational professional, graduate higher education, and public undergraduate institutions are exempt.
- (4) Finally, admissions to public undergraduate institutions which have been *traditionally* and *continually* from their establishment *single sex* are exempt from coverage.

**What Is
Mandated and
What Is
Prohibited?**

The Title IX regulations can be divided into four distinct sections:

- I. GENERAL REQUIREMENTS
- II. COVERAGE AND ADMISSIONS
- III. TREATMENT OF STUDENTS
- IV. EMPLOYMENT

GENERAL REQUIREMENTS

The Regulations stipulate five administrative steps to be taken by school districts and other educational institutions.

- A. Each district or institution should have conducted a *SELF-EVALUATION* by July 21, 1976.
- B. Each district or institution should have adopted and implemented a *GRIEVANCE PROCEDURE* by October 21, 1975.
- C. A *RESPONSIBLE EMPLOYEE* (Title IX Coordinator) should have been designated by October 21, 1975; and the name, office address, and telephone number of that individual distributed to all students and employees.
- D. A "*NO DISCRIMINATION ON BASIS OF SEX*" policy statement should have been formulated by October 21, 1975; and should be continually displayed and published.
- E. An "*ASSURANCE OF COMPLIANCE FORM*" should be filed each grant year with the Department of Health, Education and Welfare.

COVERAGE AND ADMISSIONS

For details of this section of the Regulations, see TITLE IX—Who Is Regulated—in this handbook.

TREATMENT OF STUDENTS

Once a student has been admitted to an education program or activity, *the institution cannot discriminate*

on the basis of sex in providing any aid, benefit, or service.

- This means that rules concerning a student's actual or potential parental, family or marital status which treat students differently on the basis of sex may not be applied; consequently, pregnant students may no longer be required to attend a separate program.
- Rules of behavior and appearance cannot differentiate on the basis of sex, but must apply uniformly to both males and females.
- If the institution assists third parties in making employment available to students, the institution must assure itself that such employment is available without discrimination on the basis of sex. If the third party does discriminate in its employment practices, the institution is required to withdraw its assistance.
- The use of testing materials and the appraisal and counseling of individuals by an educational institution must not discriminate on the basis of sex.
- Access to courses may not be based upon sex. Equal access to courses include physical education programs, which may not be offered separately unless they require participation in bodily contact sports or pertain to classes which deal exclusively with human sexuality at the elementary or secondary school level. Also, access to interscholastic athletics must now be provided on an equal basis unless such activities require competitive skills or involve bodily contact. However, at least one Federal District Court in *Yellow Springs Exempted Village School District Board of Education v. The Ohio High School Athletic Association*, has held that INTERSCHOLASTIC SPORTS TEAMS CAN-

**NOT BE SEX-SEGREGATED EVEN WHEN THE
SPORT INVOLVED IS A CONTACT SPORT.**

- All financial aid and other benefits (such as insurance coverage) must not be provided on the basis of sex.

EMPLOYMENT

Discrimination on the basis of sex in the terms and conditions of employment in education programs and activities is prohibited by the Regulations; like Title VII, the Title IX Regulations reach every stage and step of the employment process including, ADVERTISING, RECRUITMENT, COMPENSATION, PROMOTIONS, LEAVES, TRAINING, AND FRINGE BENEFITS. Nor, under the Regulations, can an institution enter into an agreement with unions, employment agencies, or any other organization that will subject employees to discrimination on the basis of sex.

A provision prohibiting the different treatment of marital or parental status on the basis of sex is also included. Like the similar provisions for students, pregnancy may not be treated differently from any other temporary disability for all job related purposes.

The employment provisions of the Regulations were challenged in the recent court case of *Romeo School District v. The Department of Health, Education and Welfare* (HEW). In that case, the Court held that Congress did not intend to benefit employees when it passed Title IX of the Education Amendments, but intended only to benefit students. Therefore, the Court reasoned, HEW acted outside of the intent of Congress when it subsequently included employment provisions in the final Title IX Regulations. This decision is being appealed and can be challenged on several grounds. First, the Congressional hearings held before passage of Title IX are replete with testimony about and references to employment discrimination on the basis of sex in education, suggesting that the later passage of Title IX was designed to help eliminate this form of discrimination. Second, after the Regulations (in-

cluding, of course, the Employment Sections) were promulgated by HEW, they were sent back to Congress for forty-five days. During this forty-five day period, Congress had the option of passing a "resolution of disapproval," which, in effect, would have prevented the Regulations from ever becoming effective. No such resolution was ever passed by Congress, suggesting that Congress had contemplated and approved of HEW's inclusion of employment provisions in the final Regulations. At this point, it seems highly possible that the U.S. Supreme Court will ultimately decide the intent of Congress with respect to the employment coverage of Title IX.

**Exceptions*
to Title IX's
Coverage**

Exempted from the provisions of Title IX are:

- Schools whose primary purpose is training for the U.S. military services or the merchant marine;
- Practices in schools controlled by religious organizations whenever compliance with Title IX would be contrary to their religious beliefs;
- The membership policies of the Girl and Boy Scouts, the YMCA and the YWCA, Campfire Girls and other single-sex tax exempt "youth service" organizations whose members are chiefly under age 19;
- University-based social fraternities and sororities;
- Activities relating to the American Legion's Boys State, Boys Nation, Girls State and Girls Nation conferences;
- Father-son or mother-daughter activities, so long as opportunities for "reasonably comparable" activities are offered to students of both sexes;
- Scholarships or other aid offered by colleges and universities to participants in single-sex pageants

*Taken from the PEER summary of the Title IX regulations.

which reward the combination of personal appearance, poise and talent.

**Remedies
Under the
Act**

Where an educational institution is found to be discriminating on the basis of sex, and the Department of Health, Education and Welfare (HEW) finds that this cannot be corrected informally, it may terminate or refuse to grant funds to the institution. Before such action may be taken, HEW must allow an opportunity for a hearing, and must find that there will not be voluntary compliance with the nondiscrimination requirements. In addition, HEW may refer the matter to the Attorney General of the United States with a recommendation that legal action be taken.

**For More
Information
on the Act**

The office charged with responsibility for the enforcement of Title IX is:

The Office of Civil Rights
Dept. of Health, Education, and Welfare
Washington, D.C. 20201